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BUSINESS INTERESTS CASES—OCTOBER 2009 TERM

Honorable Leon D. Lazer and Leon Friedman***

I. INTRODUCTION

HONORABLE LEON LAZER: The Supreme Court heard a variety of business interests cases in the October 2009 Term. The Term included several cases on the Federal Arbitration Act (“FAA”),¹ federal jurisdiction, antitrust, and a long-awaited case on patents.² The Court is increasingly hearing business cases, and this

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¹ 9 U.S.C.A. §§ 1-14 (West 2010).

² See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *Bilski v. Kappos*, 130 S. Ct. 3218 (2010); *Rent-a-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010); *Am. Needle, Inc. v. NFL (Am. Needle I)*, 130 S. Ct. 2201 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010); *Shady Grove Orthopedic Assocs.*

Term was of particular interest to those following the receptiveness of the Roberts Court to business interests.³

II. CORPORATE DIVERSITY OF CITIZENSHIP

The easiest case in the group, *Hertz Corp. v. Friend*,⁴ involves the issue of interpreting the requirements for corporate diversity of citizenship.⁵ Under 28 U.S.C. §1332(c)(1), “a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.”⁶ But how does one define principal place of business with respect to corporations like McDonalds, Hertz, Starbucks, and Wal-Mart? The phrase is a rather anciently derived piece of language that may not be suitable to present-day technology.⁷ Until the decision in *Hertz*, the phrase was interpreted differently by several circuits.⁸

Hertz involved a class action suit brought by two California citizens against the Hertz Corporation to recover damages for violations of state labor laws.⁹ Hertz removed the case to federal court on diversity grounds, claiming that its principal place of business was in New Jersey.¹⁰ The plaintiffs argued that California was Hertz’s principal place of business because it did more business in California than in any other state.¹¹ The district court agreed and remanded the

v. Allstate Ins. Co., 130 S. Ct. 1431 (2010); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010); *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010).

³ See Adam Liptak, *The Roberts Court; Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1 (“The Roberts [C]ourt, which has completed five terms, ruled for business interests [sixty-one] percent of the time, compared with [forty-six] percent in the last five years of the [C]ourt led by Chief Justice William H. Rehnquist, who died in 2005, and [forty-two] percent by all [C]ourts since 1953.”).

⁴ 130 S. Ct. 1181.

⁵ See *id.* at 1185.

⁶ 28 U.S.C.A. § 1332(c)(1) (West 2011).

⁷ See *Hertz*, 130 S. Ct. at 1194 (“[I]n this era of telecommuting, some corporations may divide their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet.”).

⁸ See *id.* at 1185. Compare *Tosco Corp. v. Cmty. for a Better Env’t*, 236 F.3d 495, 500 (9th Cir. 2001), *overruled by Hertz*, 130 S. Ct. 1181, and *Capitol Indemnity Corp. v. Russellville Steel Co.*, 367 F.3d 831, 836 (8th Cir. 2004) (applying the “total activity” test and looking “at all corporate activities”), with *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) (applying the “nerve center” test).

⁹ *Hertz*, 130 S. Ct. at 1186.

¹⁰ *Id.*

¹¹ *Id.*

case to the state court.¹² The district court reasoned that California was Hertz's " 'principal place of business' " because the amount of its business activity was " 'significantly larger' or 'substantially predominate[d]' " in that particular state.¹³

In an opinion written by Justice Breyer, the Supreme Court arrived at a unanimous decision on the proper test for determining a principal place of a business.¹⁴ The Court held that a corporation's principal place of business is "the place where a corporation's officers direct, control, and coordinate the corporation's activities. . . . [I]n practice[,] it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination"¹⁵ That location is "the 'nerve center,' and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion)."¹⁶

The case was remanded to resolve where Hertz's "nerve center" was located.¹⁷ But did that solve the problem? In this cyberspace age, those who are directing the corporation may be in various places, and the burden of proof is on the party asserting diversity.¹⁸ It may not necessarily be an easy burden to carry because the location of the "nerve center" may be debatable in certain cases, such as where corporations divide their command among officers located in different locations.¹⁹

¹² *Id.* at 1186-87.

¹³ *Id.* at 1186 (quoting *Friend v. Hertz Corp.*, No. C-07-5222 MMC, 2008 WL 7071465, at *1 (N.D. Cal. Jan. 15, 2008)).

¹⁴ *See Hertz*, 130 S. Ct. 1181.

¹⁵ *Id.* at 1192.

¹⁶ *Id.*

¹⁷ *Id.* at 1195.

¹⁸ *Id.* at 1194.

¹⁹ *Hertz*, 130 S. Ct. at 1194. *See also* C.R. Wright, *Supreme Court Provides Guidance for Businesses Wishing to Avoid Unfriendly State Court*, BLOOMBERG LAW REPORTS, http://www.laborlawyers.com/files/25316_fisher_phillips_wright_hertz_article_4BEB18C700021DF07F469AA.pdf (last visited Jan. 19, 2011) ("When executives use technology such as the internet to work and make decisions from home or other business locations, this may cause problems if it is shown that the high level executives do not truly 'direct, control and coordinate' corporate activities from one location where decisions 'radiate' to other corporate locations.").

III. JUDICIAL DECISIONS AND TAKINGS

Five years after *Kelo v. City of New London*,²⁰ where the Supreme Court decided in a five-to-four decision that a taking for economic purposes was a public use taking,²¹ the Court heard another takings case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.²² In *Stop the Beach*, a comparatively new judicial takings doctrine was almost born.²³

Stop the Beach involved a Florida Act that established procedures for “ ‘beach restoration and nourishment projects.’ ”²⁴ Under the Act, when there is a beach restoration, the state fixes a property line as close to “the existing mean high-water line” as possible, and that remains the permanent borderline.²⁵ The City of Destin, Florida and Walton County, Florida applied to restore 6.9 miles of beach eroded by hurricanes.²⁶ Sand taken from under water was to be used for the restoration, which would add seventy-five feet of dry land between the statutorily-fixed boundary line and the water, but the owners would maintain their right of access to water along their properties.²⁷ The effect would be that seventy-five feet of publicly owned land would sit between the owner’s property and the water.

A suit was brought by Stop the Beach Renourishment, “a nonprofit corporation formed by . . . [owners of] beachfront property bordering the project area[.]” claiming that the project deprived them of their right to accretions and their right to have their property in contact with the water.²⁸ The Florida Supreme Court concluded that the Act did not deprive the owners of their littoral rights.²⁹ The own-

²⁰ 545 U.S. 469 (2005).

²¹ *Id.* at 489-90 (relying upon over a century of jurisprudence to determine whether the parties’ “proposed condemnations [were] for a ‘public use’ within the meaning of the Fifth Amendment”).

²² 130 S. Ct. 2592.

²³ See *id.* at 2601 (supporting a judicial takings doctrine) (plurality opinion); see also Daniel L. Siegel, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 459-60 (2010) (discussing the proposed judicial takings doctrine in *Stop the Beach* and rejecting it as impractical).

²⁴ *Stop the Beach*, 130 S. Ct. at 2599 (quoting FLA. STAT. § 161.088 (2010)).

²⁵ *Id.* (citing FLA. STAT. § 161.161(5) (2010)).

²⁶ *Id.* at 2600.

²⁷ *Id.* at 2599-2600.

²⁸ *Id.* at 2600.

²⁹ *Stop the Beach*, 130 S. Ct. at 2600.

ers requested a rehearing, claiming “that the Florida Supreme Court’s decision itself effected a taking of . . . littoral rights contrary to the Fifth and Fourteenth Amendments to the Federal Constitution.”³⁰ A rehearing was denied and the United States Supreme Court granted certiorari.³¹

The case was important, not only for Florida with its extensive coastlines and tourist industry, but also for the whole country with its east, west, and gulf coasts and numerous restoration projects.³² Developers, property owners, and the conservative Cato Institute coalesced and supported the lawsuit.³³ Twenty-six states, many municipalities, and environmental groups lined up to support Florida.³⁴

At the oral argument, there was much banter about hot dog stands, port-a-potties, and blanket-toting tourists on the seventy-five publicly owned feet.³⁵ Justice Alito referred to the possibility of the state creating a huge beach for televised spring break parties on the publicly owned property.³⁶ Nevertheless, the owners’ claim of a taking was rejected by the Court, eight-to-zero.³⁷ Writing for the Court, Justice Scalia concluded that there was no taking because the State always has the right “to fill in its own seabed[;]”³⁸ the exposure of the previously submerged land which would be scooped up with the

³⁰ *Id.*

³¹ *Id.* at 2600-01.

³² See David G. Savage, *Justice May See Homeowners’ View: A Ruling on a Restored Florida Beach Opened to the Public May Affect Laws Elsewhere*, L.A. TIMES, Dec. 3, 2009, at 25 (“The high [C]ourt has never ruled that state judges have unconstitutionally taken private property. If they do so in this case, it would give property owners a weapon to challenge rulings in many states . . . that give the public greater access to beaches and shorelines.”).

³³ Joan Biskupic, *Fla. Property Case No Day at the Beach for Supreme Court; Homeowners: Coastal Restoration is Government “Taking” of Land*, USA TODAY, Dec. 3, 2009, at 2A.

³⁴ *Id.* (noting that twenty-six states supported Florida).

³⁵ Transcript of Oral Argument at 9, 13, 46-47, *Stop the Beach*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 4323938.

³⁶ *Id.* at 39-40 (“Under the decision of the Florida Supreme Court . . . [nothing] would stop the city from . . . hav[ing] televised spring break beach parties in front of . . . somebody’s house [and] . . . as a practical matter . . . that [has] a real effect on the value of the property[.]”).

³⁷ See *Stop the Beach*, 130 S. Ct. at 2613 (taking no part in this decision was Justice Stevens).

³⁸ *Id.* at 2611.

restoration was like an avulsion³⁹—the sudden and perceptible gain or loss of any land due to actions of water, such as a hurricane⁴⁰—which did not change the mean high water mark under common law⁴¹ and now the boundary line was fixed by statute.⁴²

There was a second significant issue in the case. Can a judicial decision itself constitute a compensable taking?⁴³ Justice Scalia, the creator of rules in land use cases like *Lucas v. South Carolina Coastal Council*,⁴⁴ *Dolan v. City of Tigard*,⁴⁵ and *Nollan v. California Coastal Commission*,⁴⁶ answered with a vigorous ‘yes.’⁴⁷ He summed up his position this way:

In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.⁴⁸

Thus, in Justice Scalia’s view, “takings effected by the judicial branch are not entitled to special treatment.”⁴⁹ “States effect a taking if they recharacterize as public property what was previously private

³⁹ *Id.*

⁴⁰ *Id.* at 2598.

⁴¹ *See id.* (noting that at common law “formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the state)”).

⁴² *Stop the Beach*, 130 S. Ct. at 2599.

⁴³ *Id.* at 2600.

⁴⁴ 505 U.S. 1003 (1992).

⁴⁵ 512 U.S. 374 (1994).

⁴⁶ 483 U.S. 825 (1987).

⁴⁷ *Stop the Beach*, 130 S. Ct. at 2602 (plurality opinion).

⁴⁸ *Id.*

⁴⁹ *Id.* at 2601.

property.”⁵⁰

In support of his position, Justice Scalia cited *PruneYard Shopping Center v. Robins*,⁵¹ involving a California Supreme Court decision that overturned its previous position by holding that a shopping center could not bar exercise of First Amendment rights on its property.⁵² He also cited *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*,⁵³ in which the Court found a taking when the Florida Supreme Court permitted interest on funds deposited pursuant to interpleader to be taken by the County.⁵⁴ A better case would have been *State ex rel. Thornton v. Hay*,⁵⁵ where the Oregon Supreme Court, relying on the doctrine of custom, imposed a public trust—a position that had not even been argued—and created a public easement on the dry sand area between the vegetation line and mean high water.⁵⁶

Justice Scalia’s effort was joined by three of his colleagues—Justices Roberts, Alito, and Thomas.⁵⁷ The other four Justices did not support the effort to establish a judicial takings doctrine.⁵⁸ Most of the pages of this case involve the debate over whether there is such a doctrine, whether it is premature to deal with the issue in this failed attack on the Florida Supreme Court decision, and why such a doctrine should not be adopted.⁵⁹ Most of Justice Scalia’s opinion is not an exposition of the judicial takings doctrine, but an aggressive response to separate opinions by Justice Kennedy, joined by Justice Sotomayor, and Justice Breyer, joined by Justice Ginsburg.⁶⁰ Justice Scalia was particularly hard on Justice Breyer whose reasoning he described as “how much wood would a woodchuck chuck if a wood chuck could chuck wood.”⁶¹

⁵⁰ *Id.*

⁵¹ 447 U.S. 74 (1980).

⁵² *Stop the Beach*, 130 S. Ct. at 2602.

⁵³ 449 U.S. 155 (1980).

⁵⁴ *Stop the Beach*, 130 S. Ct. at 2602.

⁵⁵ 462 P.2d 671 (Or. 1969).

⁵⁶ *Id.* at 676.

⁵⁷ *Stop the Beach*, 130 S. Ct. at 2597.

⁵⁸ *Id.* at 2613 (Kennedy, J., concurring); *id.* at 2618 (Breyer, J., concurring) (arguing that “the plurality unnecessarily addresse[d] questions of constitutional law that are better left for another day”).

⁵⁹ *Id.* at 2602, 2604, 2608 (plurality opinion).

⁶⁰ *Id.* at 2602-08.

⁶¹ *Stop the Beach*, 130 S. Ct. at 2603. Justice Scalia stated that:

Justice Breyer must either (a) grapple with the artificial question of what

In response to Justice Scalia's contention that the State cannot do by judicial decree what the takings clause forbids it to do by legislative fiat, Justice Kennedy's position was that the Due Process Clause—the deprivation of property without due process of law—and not the public use taking provision of the Fifth Amendment, is the clause that applies in such a case.⁶² It would be anomalous in his view to hold that courts implicitly can take property by changing the meaning of property law.⁶³ And then, what would the remedy be? The court reviewing the state supreme court decision could not enjoin the takings under the Fifth Amendment taking clause; it could only fix compensation.⁶⁴ Justice Scalia's view in this respect was that the reviewing court could merely reverse and leave it to the legislative body to "provide compensation or [merely] acquiesce in the invalidity of the offending feature[]." ⁶⁵ While the property owner in the original case could only reverse a claimed judicial taking through certiorari to the United States Supreme Court, claimants who were not parties to the original suit could challenge the alleged taking in the federal court to the same extent that a claimant could challenge any legislative or executive taking previously approved by the state supreme court.⁶⁶

Justice Breyer's view was that thousands of property owners litigate every year in the state courts and many of them would bring federal takings claims in the federal courts.⁶⁷ Federal district judges would then be reviewing state supreme court decisions and perhaps deciding that state supreme court judges engaged in a taking of private property and fixing compensation.⁶⁸ "[F]ederal judges would

would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (b) answer in the negative what he considers to be the "unnecessary" constitutional question whether there is such a thing as a judicial taking.

Id.

⁶² *Id.* at 2614-15 (Kennedy, J., concurring).

⁶³ *Id.* at 2615.

⁶⁴ *Id.* at 2617 ("It appears under our precedents that a party who suffers a taking is only entitled to damages, not equitable relief . . .").

⁶⁵ *Stop the Beach*, 130 S. Ct. at 2607 (plurality opinion).

⁶⁶ *Id.* at 2609-10.

⁶⁷ *Id.* at 2618-19 (Breyer, J., concurring).

⁶⁸ *See id.*

[thus] play a major role in [] shaping . . . state property law.”⁶⁹ And, as Justice Kennedy noted, if the state court stated it was only clarifying existing property law—and that would likely be most cases—what would be the standard for review?⁷⁰ Justice Scalia’s response was that review would be *de novo*.⁷¹ Both Justices Kennedy and Breyer were of the view that there was no need to decide more than what the court was currently deciding—that the Florida Supreme Court’s decision was not a taking.⁷²

While Justice Scalia did not get the fifth vote he needed to establish the doctrine of judicial taking, the doctrine is now out front, at least for discussion purposes. The four Justices who disagreed with Justice Scalia seem quite unenthralled by the judicial takings doctrine. It is unlikely that judicial takings will become a reality within any near future, but with four votes for it, it will surface again.

IV. ARBITRATION CASES

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,⁷³ AnimalFeeds brought a class action antitrust lawsuit against Stolt-Nielsen and several other shipping companies, claiming a price-fixing conspiracy.⁷⁴ The actions against the shipping companies were joined by others and, as a result of two judgments, the parties were compelled to arbitrate based on the arbitration clause in the contract.⁷⁵ AnimalFeeds served a demand for class arbitration,⁷⁶ and the parties agreed to submit the issue of whether the applicable arbitration clause allowed class arbitration to three arbitrators.⁷⁷ The arbi-

⁶⁹ *Id.* at 2619.

⁷⁰ *Stop the Beach*, 130 S. Ct. at 2616-17 (Kennedy, J., concurring).

⁷¹ *See id.* at 2608 n.9 (plurality opinion) (implying *de novo* review by stating that “[i]t is true that we make our own determination, without deference to state judges, whether the challenged decision deprives the claimant of an established property right”).

⁷² *Id.* at 2615 (Kennedy, J., concurring) (“[T]he Court should not reach beyond the necessities of the case to announce a sweeping rule that court decisions can be takings, as that phrase is used in the Takings Clause.”); *id.* at 2618 (Breyer, J., concurring) (disagreeing with the plurality’s decision to “unnecessarily address[] questions of constitutional law that are better left for another day”).

⁷³ 130 S. Ct. 1758.

⁷⁴ *Id.* at 1765.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

trators decided that class arbitration was permissible, but the district court vacated the award as a “‘manifest disregard’ of the law.”⁷⁸ The Second Circuit disagreed and reversed.⁷⁹

The Supreme Court granted certiorari and reversed the Circuit decision, five-to-three.⁸⁰ Writing for the majority, Justice Alito declared the issue was “whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the [FAA].”⁸¹ He differed with the arbitrators, finding that no case had ever decided that there could be class arbitration when the contract was silent.⁸² It was his view that silence must be construed as forbidding, rather than permitting, class arbitration.⁸³ “[E]ven though there is no tradition for class arbitration under the maritime law,” the arbitration panel regarded the agreement’s silence on the question of class arbitration as dispositive.⁸⁴ Justice Alito regarded that conclusion as “fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.”⁸⁵ The Court thus held “that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”⁸⁶ Justices Breyer and Stevens joined Justice Ginsburg’s dissent that the case was “not ripe for judicial review,” that the arbitrators had acted within their authority, that it was properly based on New York and federal maritime law as well as the decisions of other arbitrators under AAA rules, and finally that arbitration errors are not a basis for disturbing arbitration judgments.⁸⁷

Six days after the decision came down, the Supreme Court granted certiorari in another business-to-business case involving credit cards, *American Express Co. v. Italian Colors Restaurant*.⁸⁸ The Court vacated a Second Circuit decision holding that a class arbitra-

⁷⁸ *Stolt-Nielsen*, 130 S. Ct. at 1766 (quoting *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 435 F. Supp. 2d 382, 384 (S.D.N.Y. 2006)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1767, 1777.

⁸¹ *Id.* at 1764.

⁸² *Id.* at 1768-69.

⁸³ *Stolt-Nielsen*, 130 S. Ct. at 1775.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *id.* at 1777-79 (Ginsburg, J., dissenting).

⁸⁸ 130 S. Ct. 2401 (2010).

tion waiver was unenforceable.⁸⁹ The implications of *Stolt-Nielsen* on consumer class actions have been the subject of much debate.⁹⁰ What the effect of *Stolt-Nielsen* will be on consumer class actions has yet to be seen and it will be seen at the next Term of the Court.

The issue in a second arbitration case before the Court was whether under the FAA a district court “may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator.”⁹¹ Section 2 of the FAA provides, “A contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁹² The last clause, of course, implicates judicial intervention.

In *Rent-A-Center, West, Inc. v. Jackson*,⁹³ an account manager for the company had signed two single sheet agreements on being hired; one involved the terms of his employment, and the other was a stand-alone arbitration agreement, a provision of which referred all “past, present or future” disputes including discrimination and federal law violations to arbitration.⁹⁴ A second provision (referred to by the Court as a delegation provision) declared that

The Arbitrator, and *not* any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.⁹⁵

⁸⁹ *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 320 (2d Cir. 2009), *vacated sub nom.*, *Am. Express*, 130 S. Ct. 2401.

⁹⁰ *See, e.g.*, Marcia Coyle, *High Court Ruling May Fuel Battle Over Class Arbitration*, NAT’L L.J. (Jan. 19, 2011) <http://www.law.com/jsp/article.jsp?id=1202453305424> (“ ‘If this opinion means what [the defense bar] says, there won’t be any consumer class actions in any case in which the parties have an arbitration clause.’ ” (quoting F. Paul Bland of Public Justice, a Washington-based publish interest law firm)).

⁹¹ *Rent-A-Center*, 130 S. Ct. at 2775.

⁹² 9 U.S.C.A. § 2.

⁹³ 130 S. Ct. 2772.

⁹⁴ *Rent-A-Center*, 130 S. Ct. at 2775.

⁹⁵ *Id.*

Jackson who had signed the agreement as a condition of employment, was fired after three years and brought a lawsuit charging race discrimination and retaliation.⁹⁶ The district court granted Rent-a-Center's motion for a stay and to compel arbitration.⁹⁷ The Ninth Circuit reversed in part, rejecting Jackson's claim that the fee sharing provision of the arbitration agreement was unconscionable under Nevada law, but held that where "a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court."⁹⁸ The issue, before the Supreme Court, of course, was who decides that question, the arbitrators or the court?⁹⁹

With Justice Scalia writing for the majority, the Supreme Court reversed the Ninth Circuit's decision, five-to-four.¹⁰⁰ Arbitration, Justice Scalia wrote, is a matter of contract "on . . . equal footing with other contracts."¹⁰¹ The delegation provision to the arbitrators to decide this issue of arbitrability is simply an agreement, and the question is its validity.¹⁰² In *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*¹⁰³ and *Buckeye Check Cashing, Inc. v. Cardegna*,¹⁰⁴ the Court had decided that the question of enforceability of a contract as a whole is for the arbitrator, but that the arbitration clause of the contract is severable and subject to attack in the courts.¹⁰⁵ So, if the validity of the overall contract is attacked as unenforceable, the arbitrator has the authority to decide the issue of enforceability,¹⁰⁶ but if it is the arbitration clause itself that is challenged specifically, for

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 2776 (quoting *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912, 917 (9th Cir. 2009)).

⁹⁹ *Rent-A-Center*, 130 S. Ct. at 2776.

¹⁰⁰ *Id.* at 2775, 2781.

¹⁰¹ *Id.* at 2776.

¹⁰² *Id.* at 2777-78.

¹⁰³ 388 U.S. 395 (1967).

¹⁰⁴ 546 U.S. 440 (2006).

¹⁰⁵ *Id.* at 449 ("We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."); *Prima Paint Corp.*, 388 U.S. at 404 ("[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it.").

¹⁰⁶ *Buckeye Check Cashing, Inc.*, 546 U.S. at 449.

instance as having been fraudulently induced, it will be severed and the court will intervene.¹⁰⁷

But, here the arbitration agreement stood alone and was not part of the overall employment agreement, so what was there to sever? The majority held that the delegation provision to the arbitrators to decide the enforceability issues was itself severable, and it was the employee's burden to prove the unconscionability of that provision.¹⁰⁸ Proving the unconscionability of such a delegation provision is a difficult task, and Jackson had made no effort in that direction.¹⁰⁹ Arbitration is a matter of contract law, and the delegation to the arbitrators to decide a gateway issue constitutes an "additional, antecedent agreement [in an arbitration agreement that] the party seeking arbitration asks the federal court[s] to enforce."¹¹⁰ Unless grounds exist for revocation of the antecedent agreement, the federal courts will enforce it.¹¹¹ Jackson failed to make the requisite showing.¹¹²

The dissent, Justice Stevens writing, noted that the arbitration agreement covered nothing else but arbitration and that the majority simply "pluck[ed] from a potentially invalid arbitration agreement [an] even narrower provision[] that referr[ed] [a] particular arbitrability dispute[] to an arbitrator[,] and thus deprived the employee's opportunity for judicial intervention."¹¹³ Quite apparently, the employment bar does not want arbitrators deciding gateway issues. But under an arbitration agreement that delegates the gateway issues to the arbitrators, there will likely be very little opportunity for judicial intervention unless the delegation to the arbitrators itself is found to be unconscionable.¹¹⁴ How that can be proved is yet to be ascertained.

V. PRINCIPLES OF SEPARATION OF POWERS

PROFESSOR FRIEDMAN: *Free Enterprise Fund v. Public*

¹⁰⁷ *Prima Paint Corp.*, 388 U.S. at 404.

¹⁰⁸ *Rent-A-Center*, 130 S. Ct. at 2779.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2777-78.

¹¹¹ *Id.* at 2778.

¹¹² *Id.* at 2779.

¹¹³ *Rent-A-Center*, 130 S. Ct. at 2786 (Stevens, J., dissenting).

¹¹⁴ *Id.* at 2787.

*Company Accounting Oversight Board*¹¹⁵ concerned the issue of whether the Public Company Accounting Oversight Board (“PCAOB”), created by the Sarbanes-Oxley Act of 2002,¹¹⁶ violated the Constitution’s separation of powers principles.¹¹⁷ The Act created a board, the PCAOB, that would inspect accounting firms, conduct investigations, create auditing and ethical guidelines, and conduct disciplinary proceedings.¹¹⁸ Every accounting firm that audits public companies must register with the PCAOB, pay an annual fee, and comply with its rules.¹¹⁹

This case focused on the way the PCAOB was organized.¹²⁰ It consists of five members who are appointed by the Securities and Exchange Commission (“SEC”), the members of which are appointed by the President.¹²¹ However, the Appointments Clause of the Constitution states that officers must be appointed by the President with the “[a]dvice and [c]onsent of the Senate,” and inferior officers may only be appointed by the “President alone, in the Courts of Law, or in the Heads of Departments.”¹²² Thus, one issue the Court faced was whether the SEC was a department for purposes of the Appointments Clause, and if so, who was considered at its head.¹²³ The Court found that the SEC was a department and that its Commissioners, as a body, were at its head.¹²⁴

The second issue that *Free Enterprise Fund* raised was whether the PCAOB must be accountable to the President.¹²⁵ As it was configured, the PCAOB was only accountable to the SEC, which can remove its members.¹²⁶ Writing for the majority, Chief Justice Roberts concluded:

This novel structure does not merely add to the

¹¹⁵ 130 S. Ct. 3138.

¹¹⁶ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

¹¹⁷ *Free Enter. Fund*, 130 S. Ct. at 3149.

¹¹⁸ *Id.* at 3147-48.

¹¹⁹ *Id.* at 3147.

¹²⁰ *See id.* at 3153-54.

¹²¹ *Id.* at 3147, 3163.

¹²² U.S. CONST. art. II, § 2, cl. 2.

¹²³ *Free Enter. Fund*, 130 S. Ct. at 3162-63.

¹²⁴ *Id.*

¹²⁵ *See id.* at 3151-55.

¹²⁶ *Id.* at 3148, 3153 (“The result [of the Act] is a Board that is not accountable to the President, and a President who is not responsible for the Board.”).

Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.¹²⁷

The majority reached this conclusion by examining the two layers of tenure that exist to protect the PCAOB.¹²⁸ It noted that under those layers, while the President could hold the SEC Commissioners accountable, he had no control over the PCAOB because that control was solely in the hands of the SEC Commissioners.¹²⁹

Free Enterprise also claimed that the PCAOB was not accountable to the President because of the double layer of protection.¹³⁰ The President had no power to dismiss members of the PCAOB for cause.¹³¹ Justice Breyer, in his dissent, harped on this, stating that “The Court . . . , by assumption, reads *into* the statute books a ‘for cause removal’ phrase that does not appear in the relevant statute and which Congress probably did not intend to write.”¹³² Chief Justice Roberts concluded that it was true because the parties stipulated to it.¹³³ “The parties agree[d] that the Commissioners cannot themselves be removed by the President except” for inefficiency, neglect, or malfeasance.¹³⁴

Despite the argument that the PCAOB was not accountable to the President, the Court ruled against Free Enterprise.¹³⁵ In essence, the Supreme Court interpreted the statute in such a way that permitted the SEC to fire the members of the PCAOB for any reason.¹³⁶

¹²⁷ *Id.* at 3154.

¹²⁸ *Free Enter. Fund*, 130 S. Ct. at 3153-54.

¹²⁹ *Id.*

¹³⁰ *Free Enter. Fund*, 130 S. Ct. at 3149.

¹³¹ *See id.* at 3164 (stating that Congress cannot limit the President's power with the dual limitations on the removal of members of the PCAOB for cause as required by the Sarbanes-Oxley Act).

¹³² *Id.* at 3184 (Breyer, J., dissenting).

¹³³ *Id.* at 3148-49 (majority opinion).

¹³⁴ *Id.* (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935)).

¹³⁵ *See generally Free Enter. Fund*, 130 S. Ct. 3138.

¹³⁶ *See id.* at 3161-62.

This was the only way that the Supreme Court could find executive control over the Board in a manner that would satisfy the constitutional requirements of separation of powers.¹³⁷ The Court presented a very elaborate analysis, noting that the President must control everybody performing executive-type functions, and included a list of cases on this point.¹³⁸ The Court concluded that the SEC is without a layer of insulation; it could remove a Board member at any time and would be fully responsible for the Board's actions.¹³⁹ "The President could then hold the Commission to account for its supervision of the Board," and that would satisfy the separation of powers argument.¹⁴⁰ Thus, the PCAOB was a valid organization that could issue orders against Free Enterprise.¹⁴¹ The dissent by Justice Breyer lists over forty separate bodies of the executive branch that have exactly the same structure as the PCAOB, meaning a Presidential appointment of a head of one of these agencies can only be removed for cause.¹⁴²

The Court faced a problem similar to *Free Enterprise Fund* in *New Process Steel, L.P. v. NLRB*,¹⁴³ where two members of the NLRB resigned and the Senate would not allow the President to fill the vacancies.¹⁴⁴ The result was that the NLRB consisted of only two people.¹⁴⁵ The Supreme Court said that having only two people serve on a five-member board prevents it from performing the statutory duties that are required.¹⁴⁶

VI. ANTITRUST

*American Needle, Inc. v. National Football League*¹⁴⁷ involved the question of whether the National Football League's

¹³⁷ See *id.*

¹³⁸ See *id.* at 3151-53 (citing *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Ex'r*, 295 U.S. 602; *Myers v. United States*, 272 U.S. 52 (1926); *United States v. Perkins*, 116 U.S. 483 (1886)).

¹³⁹ *Free Enter. Fund*, 130 S. Ct. at 3153-54.

¹⁴⁰ See *id.* at 3154.

¹⁴¹ See *id.* at 3161.

¹⁴² See *id.* at 3185-3218 (Breyer, J., dissenting).

¹⁴³ 130 S. Ct. 2635 (2010).

¹⁴⁴ See *id.* at 2638.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2638 (holding "that two remaining Board members cannot exercise such authority").

¹⁴⁷ 130 S. Ct. 2201.

("NFL") licensing activities violated the Sherman Antitrust Act.¹⁴⁸ In 1963, the NFL, comprised of thirty-two football teams, formed an organization called the National Football League Properties ("NFLP") "to develop, license, and market their intellectual property."¹⁴⁹ American Needle was a licensee of the NFLP, manufacturing and selling products with the symbols of the NFL teams.¹⁵⁰ However, the NFLP decided to have an exclusive license with Reebok to prevent other suppliers from manufacturing and selling trademarked headgear bearing any NFL team's insignia.¹⁵¹ American Needle brought suit, claiming that the agreements between Reebok, the NFLP, the NFL, and its teams violated the Sherman Antitrust Act.¹⁵²

The specific issue before the Supreme Court was whether the NFL was a single entity for antitrust purposes or whether it was thirty-two separate entities.¹⁵³ If the NFL was a single entity, then the agreements did not constitute a violation of the Sherman Antitrust Act.¹⁵⁴ The Seventh Circuit found that the NFL was a single entity and therefore, concluded there was no antitrust violation because of the joint effort between the teams.¹⁵⁵ The Supreme Court disagreed, reasoning that "[t]he teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel[.]" and they "compete in the market for intellectual property."¹⁵⁶ This case serves as an important reminder to sports teams that they must pay close attention to the antitrust laws.¹⁵⁷

¹⁴⁸ *Id.* at 2206-07.

¹⁴⁹ *Id.* at 2207.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Am. Needle I*, 130 S. Ct. at 2207. *See also* Sherman Act, 15 U.S.C.A. §§ 1-2 (West 2010).

¹⁵³ *Am. Needle I*, 130 S. Ct. at 2208 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984)).

¹⁵⁴ *Id.* at 2207.

¹⁵⁵ *Id.* at 2207-08 (citing *Am. Needle Inc. v. NFL (Am. Needle II)*, 538 F.3d 736, 741 (7th Cir. 2008), *Am. Needle Inc. v. New Orleans Louisiana Saints (Am. Needle III)*, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007)).

¹⁵⁶ *Id.* at 2212-13 (citing *Brown v. Pro Football, Inc.*, 518 U.S. 231, 249 (1996); *Sullivan v. NFL*, 34 F.3d 1091, 1098 (1st Cir. 1994); *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 787 (3d Cir. 1983)).

¹⁵⁷ *See* David G. Savage, *High Court Rules Against NFL in Antitrust Suit: The Justices Revive a Case that Challenged a Marketing Deal for Team Merchandise*, L.A. TIMES, May 25, 2010, at 2 (noting that the decision "deal[t] a setback to sports leagues that seek to close-

VII. PATENTS

*Bilski v. Kappos*¹⁵⁸ was the highly anticipated patent case of the Court's last Term.¹⁵⁹ The issue in *Bilski* was whether a business method is patentable.¹⁶⁰ In *Bilski*, the specific business method sought to be patented was a process for hedging risk in the energy market.¹⁶¹ The United States Court of Appeals for the Federal Circuit held that a business method cannot be patented unless "it is tied to a particular machine or apparatus, or . . . it transforms a particular article into a different state or thing."¹⁶² However, the Supreme Court considered the test to be too restrictive.¹⁶³ The Court also concluded that while there may be some business processes that could be patented,¹⁶⁴ the particular method involved in this case could not.¹⁶⁵

The Court reasoned that the process of hedging risk in commodity trades was a mere abstract idea and could not be patented under any circumstances.¹⁶⁶ Justice Stevens, in a concurring opinion, joined by Justices Ginsburg, Breyer, and Sotomayor, stated that there were no circumstances under which an intellectual process may be patented.¹⁶⁷ The ambiguity of the Court's language as to the possibility of patenting a business method will no doubt have an effect on businesses in the future.¹⁶⁸

ly control the marketing of their teams and their spin-off merchandise").

¹⁵⁸ 130 S. Ct. 3218.

¹⁵⁹ See, e.g., John Schwartz, *Broad View of Patents on Methods*, N.Y. TIMES, June 29, 2010, at B1.

¹⁶⁰ *Bilski*, 130 S. Ct. at 3223.

¹⁶¹ *Id.*

¹⁶² *Id.* at 3224 (quoting *In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008)).

¹⁶³ *Id.* at 3227 ("This Court's precedents establish that the machine-or-transformation test is a useful and important clue, an investigative tool, for determining whether some claimed inventions are processes under § 101. The machine-or-transformation test is not the sole test for deciding whether an invention is a patent-eligible 'process.'").

¹⁶⁴ *Id.* at 3228-30 ("[W]hile § 273 appears to leave open the possibility of some business method patents, it does not suggest broad patentability of such claimed inventions.").

¹⁶⁵ *Bilski*, 130 S. Ct. at 3229-31.

¹⁶⁶ *Id.* at 3230.

¹⁶⁷ *Id.* at 3232 (Stevens, J., concurring) ("[T]he Court is quite wrong . . . to suggest that any series of steps that is not itself an abstract idea or law of nature may constitute a 'process' within the meaning of § 101.").

¹⁶⁸ See Schwartz, *supra* note 159 ("The [C]ourt, by pursuing a moderate path, has left much unresolved . . ."); *Bilski*, 130 S. Ct. at 3255-56.

The primary concern is that patents on business methods may prohibit a wide swath of legitimate competition and innovation. . . .

VIII. COPYRIGHTS

The one copyright case of the Term was *Reed Elsevier, Inc. v. Muchnick*.¹⁶⁹ Several years ago, the Supreme Court decided a case called *New York Times Co. v. Tasini*.¹⁷⁰ In *Tasini*, the Court held that the copyrights of freelance authors were infringed when several print publishers reproduced and distributed articles to online databases, without first obtaining the authors' permission.¹⁷¹ The Court reasoned that the work was not considered a revision under 17 U.S.C. § 201(c).¹⁷²

Reed Elsevier involved a class action lawsuit brought by several authors in federal court seeking to recover payment from the publishers under 17 U.S.C. § 411.¹⁷³ The issue was "whether § 411(a) restrict[ed] the subject-matter jurisdiction of the federal courts over copyright infringement actions."¹⁷⁴ In a decision written by Justice Thomas, the Supreme Court held eight-to-zero that § 411 was not a jurisdiction-conferring statute, thus the federal courts did have jurisdiction over persons who had not registered their trade-

If business methods could be patented, then many business decisions, no matter how small, could be *potential* patent violations. Businesses would either live in constant fear of litigation or would need to undertake the costs of searching through patents that describe methods of doing business, attempting to decide whether their innovation is one that remains in the public domain.

Id. at 3255-56.

¹⁶⁹ 130 S. Ct. 1237.

¹⁷⁰ 533 U.S. 483 (2001).

¹⁷¹ *Id.* at 487.

¹⁷² *Id.* at 488.

¹⁷³ *Reed Elsevier*, 130 S. Ct. at 1242.

¹⁷⁴ *Id.* at 1243. 17 U.S.C. § 411(a) provides, in pertinent part:

Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. . . .

17 U.S.C.A. § 411(a) (West 2010).

marks.¹⁷⁵

*Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*¹⁷⁶ represented another case in which the Supreme Court reversed a Second Circuit decision.¹⁷⁷ *Shady Grove* involved a class action diversity lawsuit filed by Shady Grove against Allstate Insurance in federal court, which involved New York State law.¹⁷⁸ Shady Grove brought the suit to collect unpaid statutory interest because Allstate failed “to pay interest on overdue benefits.”¹⁷⁹ Allstate claimed that the federal courts lacked jurisdiction because New York Civil Practice Law and Rule 901(b)¹⁸⁰ does not permit class actions to collect a statutory penalty.¹⁸¹

The issue was whether Federal Rule of Civil Procedure Rule 23, which sets forth the requirements for certification of class action lawsuits, conflicts with New York law.¹⁸² The Rules Enabling Act¹⁸³ states that the Federal Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right.”¹⁸⁴ Allstate argued that section 901(b) created a substantive right and therefore, Rule 23 violated the Rules Enabling Act.¹⁸⁵ The Second Circuit agreed with Allstate and held that section 901(b) created a substantive right that “must be applied by federal courts sitting in diversity.”¹⁸⁶ The Supreme Court disagreed stating:

In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely

¹⁷⁵ *Reed Elsevier*, 130 S. Ct. at 1248.

¹⁷⁶ 130 S. Ct. 1431.

¹⁷⁷ *Id.* at 1448.

¹⁷⁸ *Id.* at 1436.

¹⁷⁹ *Id.* at 1436-37.

¹⁸⁰ N.Y. C.P.L.R. 901(b) (McKinney 2011).

¹⁸¹ *Shady Grove*, 130 S. Ct. at 1438.

¹⁸² *See id.* at 1437.

¹⁸³ 28 U.S.C.A. §§ 2071-77 (West 2011). Section 2076 was repealed by Title IV of the Judicial Improvements and Access to Justice Act of 1988. Pub. L. No. 100-702, § 401(c), 102 Stat. 4650.

¹⁸⁴ 28 U.S.C.A. § 2072(b).

¹⁸⁵ *Shady Grove*, 130 S. Ct. at 1443.

¹⁸⁶ *Id.* at 1437.

upon whether it regulates procedure. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.¹⁸⁷

The Court reversed the Second Circuit and remanded the case.¹⁸⁸

IX. CONCLUSION

The previous five Terms of the Supreme Court under Chief Justice Roberts have been increasingly receptive to business cases.¹⁸⁹ However, not all of the cases were resolved in favor of business interests, such as *American Needle*. Other cases, such as *Bilski*, did not send a particularly clear message regarding important business issues. Nevertheless, the October 2009 Term was an excellent opportunity to view the continuing transformation of the Roberts Court with the addition of Justice Sotomayor. It will be interesting to see how the Court will continue to take shape with the recent appointment of Justice Kagan.

¹⁸⁷ *Id.* at 1444 (citing *Burlington N. R.R. v. Woods*, 480 U.S. 1, 8 (1987); *Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

¹⁸⁸ *Id.* at 1448.

¹⁸⁹ See Liptak, *supra* note 3.

